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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Granite State Insurance Company,

10 Plaintiff,

11 v.

12 CME Professional Services LLC,

13 Defendant.
14

No. CV-18-02488-PHX-JGZ

ORDER

15
16 Pending before the Court is a Motion for Default Judgment filed by Plaintiff on
17 October 25, 2018. (Doc. 18.) Defendant did not file a response. Having reviewed the
18 motion and all filings in this matter, the Court will grant the Motion for Default Judgment.

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 This case arises out of a workers' compensation and employer's liability insurance
21 policy for two separate periods of coverage. Plaintiff Granite State Insurance Company
22 issued the policy to Defendant CME Professional Services LLC on or about August 6,
23 2015, to cover the period of August 2, 2015 to August 2, 2016 ("First Policy Period").
24 (Doc. 11, ¶ 16.) Per the policy's terms, Plaintiff provided Defendant with the estimated
25 annual premium, including taxes and fees, of \$727,502. (Doc. 11, Ex. A.)¹ The policy
26 further provided that the final premium would be determined "after this policy ends by
27 using the actual, not the estimated, premium basis and the proper classifications and rates

28 ¹ The insurance agreement clearly states that the premiums "shown on the Information
page, schedules, and endorsements [are] an estimate." (Doc. 11-1, Ex. A.)

1 that lawfully apply to the business and work covered by this policy.” (*Id.*) Between
2 September 9, 2015 and May 26, 2016, Plaintiff issued several endorsements that increased
3 the premium by a net \$780,565. (Doc. 11, ¶¶ 18–24.) Plaintiff subsequently conducted two
4 audits of Defendant’s books and records for the First Policy Period. Based on the audits,
5 Plaintiff calculated that the Defendant’s premium should be increased by a net \$66,014.
6 (*Id.* at ¶¶ 25–28.) Ultimately, Plaintiff determined that the Defendant owed a total premium
7 on the First Policy Period of \$1,574,081. (Doc. 11, ¶ 29.) Defendant has paid
8 \$1,370,865.74 to Plaintiff towards the premium due for the First Policy Period. (Doc. 11,
9 ¶ 30.)

10 On or about August 4, 2016, Plaintiff renewed the Policy for the policy period of
11 August 2, 2016 to August 2, 2017 (“the Second Policy Period”). The total estimated annual
12 premium for the Second Policy Period was \$1,700,135. (*Id.* at ¶¶ 32–33.) Between October
13 4, 2016 and May 24, 2017, Plaintiff issued several endorsements and amended class codes,
14 decreasing the premium by a net \$968,625. (*Id.* at 34–41.) After conducting an audit,
15 Plaintiff reduced the premium by \$92,843. (*Id.* at ¶¶ 42–43.) The Plaintiff ultimately
16 determined that the Defendant owed a total premium of \$638,667 for the Second Policy
17 Period. (*Id.* at ¶ 44.) Defendant has paid \$544,921.42 to Plaintiff for the premium due for
18 the Second Policy Period. (*Id.* at ¶ 45).

19 Plaintiff billed Defendant on April 6, 2017 for the \$203,215.26 due on the First
20 Policy Period (Doc. 18-2) and on October 30, 2017 for the \$93,745.58 due on the Second
21 Policy Period. (Doc. 18-3.) Plaintiff also sent Defendant demand letters requesting
22 payment. (Doc. 18.)² Defendant has failed to provide payment regarding either invoice.
23 (Doc. 11, ¶¶ 51–54.)

24 On August 6, 2018, Plaintiff initiated this action, seeking contractual damages in
25 the amount of \$296,256.84, pretrial and posttrial interest, and attorney’s fees and costs.

26 ² In support of its Motion, Plaintiff attaches a Declaration from Aleksandra Fish Ashby,
27 who is a custodian of records for Plaintiff. (Doc. 18-1.) Ms. Ashby avers that pursuant to
28 the Policy, Plaintiff conducted audits of Defendant’s books and records, and issued the
April 6 and October 30, 2017 invoices (attached to the Declaration) to Defendant for the
outstanding premium balance due. (*Id.* at ¶¶ 5–8.)

1 (Doc. 1.) On August 13, 2018, Plaintiff filed an Amended Complaint to address subject
2 matter jurisdiction. (Docs. 9 & 11.)³ Defendant was served with the Amended Complaint
3 and Summons on September 7, 2018. (Doc. 14.) Defendant failed to respond or answer.
4 Thereafter, Plaintiff requested the Clerk of the Court to enter default against Defendant
5 (Doc. 15), which the Clerk entered on October 2, 2018. (Doc. 16.) Plaintiff now seeks
6 entry of default judgment against Defendant.

8 DISCUSSION

9 A. Default Judgment

10 After entry of default, a court may grant a default judgment on the merits of the
11 case. *See* Fed. R. Civ. P. 55. The decision to enter a default judgment is a matter left to the
12 sound discretion of the court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In its
13 determination whether to enter default judgment, the court may consider as factors:

14 (1) the possibility of prejudice to the plaintiff; (2) the merits of
15 plaintiff's substantive claim; (3) the sufficiency of the complaint;
16 (4) the sum of money at stake in the action; (5) the possibility of
17 a dispute concerning material facts; (6) whether the default was
18 due to excusable neglect, and (7) the strong policy underlying
the Federal Rules of Civil Procedure favoring decisions on the
merits.

19 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). Once default has been entered,
20 the court may take as true all factual allegations in Plaintiff's Complaint, except those
21 relating to the amount of damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915 (9th
22 Cir. 1987). However, that does not relieve the plaintiff of its duty to plead specific
23 allegations, as "defendant is not held to admit facts that are not well-pleaded or to admit
24 conclusions of law." *DirecTv, Inc. v. Hoa Huynh*, 503 F.3d 847, 855 (9th Cir. 2007).

25
26 ³Based on the allegations in the Amended Complaint, the Court concludes that it
27 has subject matter jurisdiction over this action and personal jurisdiction over Defendant.
28 The amount in controversy in this action exceeds \$75,000 and the parties are citizens of
different states. 28 U.S.C. § 1332. Defendant CME is a LLC registered under Indiana law
with a principal place of business in Arizona. Its only two members are citizens of Arizona.
Plaintiff Granite State is organized under Illinois state laws and retains a principal place of
business in New York.

1 Upon consideration of the *Eitel* factors, the Court concludes that entry of default
2 judgment against Defendant CME Professional Services is proper.

3 **1. The possibility of prejudice to Plaintiff**

4 Plaintiff will suffer prejudice if default judgment is not entered. *Eitel*, 782 F.2d at
5 1471–72. Plaintiff provided insurance coverage, which Defendant accepted, and for which
6 Defendant has failed to pay the \$296,960.84⁴ balance owed. Plaintiff attempted to resolve
7 the matter without judicial involvement by sending invoices and demand letters.
8 Defendant’s failure to remit payment, along with its failure to respond to or answer the
9 Complaint makes it unlikely Plaintiff could recover absent entry of default judgment. The
10 Court concludes that Plaintiff would suffer prejudice if its motion for default judgment was
11 denied because it would be “without other recourse for recovery.” *PepsiCo, Inc. v. Cal.*
12 *Sec. Cans*, 238 F.Supp.2d 1172, 1177 (C.D. Cal. 2002). This factor greatly weighs in favor
13 of granting default judgment.

14 **2. Merits of the Substantive Claim & Sufficiency of the Complaint**

15 *Eitel* “require[s] that a plaintiff state a claim on which the [plaintiff] may recover.”
16 *Phillip Morris U.S.A., Inc. v Castworld Prods. Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003)
17 (internal quotation marks omitted). Plaintiff’s Complaint is grounded in a claim for breach
18 of contract. The elements of a breach of contract claim are (1) a contract exists, (2) breach
19 of the contract, and (3) resulting damages. *Chartone, Inc. v. Bernini*, 83 P.3d 1103, 1111
20 (Ariz. App. 2004). Plaintiff’s Complaint also advances an unjust enrichment theory, which
21 provides a remedy when a party has received a benefit at another’s expense, and the
22 benefitted party should compensate the other. *Wang Elec., Inc. v. Smoke Tree Resort, LLC*,
23 283 P.3d 45, 49 (Ariz. App. 2012). Plaintiff has presented evidence demonstrating the
24 existence of a contract with Defendant, Defendant’s breach of the contract, and Plaintiff’s
25 resulting damages. The invoices dated April 6, 2017 and October 30, 2017 provided
26 Defendant with notice of insurance premiums owed under the contract. Thus, the Court

27 _____
28 ⁴ Plaintiff has provided invoices showing \$296,960.84 due. In its Amended Complaint, Plaintiff seeks a lesser amount of \$296,256.84; the invoiced amount is reduced to account for work performed in Oregon, which is not at issue in this lawsuit.

1 concludes Plaintiff has stated a claim for breach of contract. Further, because Defendant
2 received the insurance coverage under the policy, failure to fully compensate Granite State
3 would unjustly enrich Defendant.

4 **3. Sum at Stake**

5 This factor requires the Court to consider the amount of money at stake in relation
6 to the seriousness of a defendant's conduct. *Eitel*, 782 F.2d at 1471–72. Here, Defendant
7 has failed to fully pay insurance premiums owed under its contractual agreement with
8 Plaintiff, despite efforts by Plaintiff to recover the full amount owed. The amount of money
9 at stake is substantial. Plaintiff requests payment of the \$296,256.84 owed for the
10 insurance coverage, as well as prejudgment interest pursuant to A.R.S. § 44.1201 and post-
11 judgment interest pursuant to 28 U.S.C. § 1961(a). Plaintiff's request is grounded in the
12 contract and supported by law and Defendant would be unjustly enriched absent payment.
13 This factor weighs in favor of default judgment.

14 **4. Possible Dispute Concerning Material Facts**

15 The Court next considers the likelihood of a dispute concerning material facts. *Eitel*,
16 782 F.2d at 1471–72. Here, there is little possibility of dispute concerning material facts.
17 Defendant has failed to file an answer or response to the Plaintiff's Complaint. Nor has
18 Defendant otherwise presented any evidence. On entry of default, the court may accept as
19 true all well-pleaded facts in the Complaint, except those relating to damages, and any later
20 provided evidence in the form of affidavits and exhibits. *See Televideo Sys., Inc.*, 826 F.2d
21 at 917–18. Plaintiff's Amended Complaint, Motion, and attached exhibits and declaration
22 establish the existence of the policy, its terms, audits, calculation of the premiums due,
23 Defendant's breach of the contract, and the resulting damages. Upon review of the record,
24 the Court finds there is little likelihood of dispute concerning the contract terms or the
25 amounts due under the policy. Thus, this factor weighs in favor of default judgment.

26 **5. Excusable Neglect**

27 Under this factor, the Court evaluates whether the failure to answer or defend is due
28 to excusable neglect. *See Eitel*, 782 F.2d at 1472. In the instant case, Defendant received

1 notice of Plaintiff's First Amended Complaint on September 7, 2018 (Doc. 14), multiple
2 demand letters prior to the Court's involvement (Doc. 18), and two invoices for the policy
3 amounts owed. Defendant failed to respond to the First Amended Complaint, the Entry of
4 Default on October 2, 2018, and this pending Motion filed on October 25, 2018. Under
5 these circumstances, the possibility of excusable neglect appears to be remote.
6 Accordingly, this factor weighs in favor of granting default judgment.

7 **6. Strong Policy Favoring Decisions on the Merits**

8 Generally, default judgments are disfavored because "cases should be decided upon
9 their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. However, because a
10 discretionary standard is applied, "default judgments are more often granted than denied."
11 *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D 431, 432 (C.D. Cal. 1999). Indeed, the mere
12 existence of Fed. R. Civ. P. 55(b) indicates that the seventh *Eitel* factor is not dispositive.
13 *Cal. Sec. Cans*, 238 F.Supp.2d at 1177. Here, Defendant's failure to defend this matter
14 makes a decision on the merits impractical, if not impossible. Therefore, the policy
15 encouraging decisions of cases on their merits does not weigh against granting default
16 judgment here.

17 **B. Damages**

18 Having determined that entry of default judgment is proper, the Court now turns to
19 the matter of damages. "A default judgment must not differ in kind from, or exceed in
20 amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). Because the allegations
21 in the complaint are taken as true "[i]njury is established and plaintiff need prove only that
22 the compensation sought relates to the damages that naturally flow from the injuries pled."
23 *Black & Decker (U.S.), Inc. v. All Spares, Inc.*, 2010 WL 3034887, *3 (D. Ariz. Aug. 3,
24 2010) (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D.
25 Cal. 2003). While the Court is not required to issue findings of fact as to liability, it must
26 do so as to damages. *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

27 **1. Direct damages**

28 The Court finds that Granite State's request for damages in the amount of

1 \$296,256.84 is appropriate and the requested relief naturally arises out of Defendant's
2 breach of contract. The insurance-coverage agreement provided an estimated premium of
3 \$727,502 for the First Policy Period. (Doc. 11, Ex. A.) Between September 9, 2015 and
4 May 26, 2016, Granite State issued several endorsements that increased the premium by a
5 net \$780,565. (Doc. 11, Ex. B–H.) After conducting audits on November 15, 2016 and
6 March 31, 2017, the premium increased by a net \$66,014. (Doc. 11, Ex. I–J.) The resulting
7 final premium was \$1,574,081, which was invoiced to Defendant on April 6, 2017. (Doc.
8 18-2.) The invoice reflects payments received totaling \$1,370,865.74, and Plaintiff's
9 custodian of records avers as to the authenticity of the invoice. (Docs. 18-1 & 18-2.) Thus,
10 Plaintiff has demonstrated the total amount outstanding for the First Policy Period is
11 \$202,657.26.⁵

12 The insurance-coverage agreement provides an estimated premium of \$1,700,135
13 for the Second Policy Period. (Doc. 11, Ex. K.) Between October 4, 2016 and May 24,
14 2017, Granite State issued several endorsements that decreased the premium by a net
15 \$968,625. (Doc. 11, Ex. L–S.) After conducting an audit on October 25, 2017, the premium
16 was decreased by \$92,843. (Doc. 11, Ex. T.) The resulting final premium was \$638,667,
17 which was invoiced to Defendant on October 30, 2017. (Doc. 18-3.) The invoice reflects
18 payments received totaling \$544,921.42, and Plaintiff's custodian of record avers as to the
19 authenticity of the invoice. (Docs. 18-1 & 18-3.) Thus, Plaintiff has demonstrated the total
20 amount outstanding for the Second Policy Period is \$93,599.58.⁶

21 The insurance agreement makes clear that the premiums “shown on the Information
22 Page, schedules, and endorsements” are merely an estimate. The final premium reflects
23 “the proper classifications and rates that lawfully apply.”

24 **2. Prejudgment interest**

25 Federal courts sitting in diversity apply state law in assessing prejudgment interest.

26 ⁵ Plaintiff does not seek recovery for \$558 of the invoiced amount of \$203,215.26 because
27 it pertains to work performed in Oregon, which is not at issue in this matter.

28 ⁶ Plaintiff similarly does not seek \$146 of the invoiced amount of \$93,745.58 because it
relates to work performed in Oregon.

1 *American Tel. & Tel. Co. v. United Computer Sys., Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996).
2 Under Arizona law, “prejudgment interest on a liquidated claim is a matter of right.” *AMHS*
3 *Ins. Co. v. Mut. Ins. Co. of Ariz.*, 258 F.3d 1090, 1103 (9th Cir. 2001). A claim is liquidated
4 if the plaintiffs provide a basis for precisely calculating the amounts claimed. *Gemstar Ltd.*
5 *v. Ernst & Young*, 917 P.2d 222, 237 (Ariz. 1996). Further, prejudgment interest begins
6 when the creditor provides to the debtor “sufficient information and supporting data so as
7 to enable the debtor to ascertain the amount owed.” *AMHS*, 258 F.3d at 1103 (quoting
8 *Homes & Son Constr. Co. Inc. v. Bolo Corp.*, 526 P.2d 1258, 1261 (Ariz. App. 1974).
9 Arizona law states that interest on a judgment shall be assessed at the lesser of 10% per
10 annum or at a rate per annum that is “equal to one per cent plus the prime rate.” A.R.S. §
11 44-1201(b) & (f).

12 Here, Plaintiff has precisely calculated the amounts owing under the Policy based
13 on the insurance agreement, endorsements, audits, and amounts deducted for work
14 performed in Oregon, and the total amount owed is readily ascertainable: \$296,256.84.
15 The invoices dated April 6, 2017 and October 30, 2017 provided clear information to the
16 Defendant as to the amounts owed. The prime rate as of January 30, 2019, as published
17 by the Federal Reserve System is 5.50%. The prejudgment interest rate is therefore 6.50%.
18 The Court finds that Granite State is therefore entitled to prejudgment interest of 6.5% per
19 annum on \$202,657.26 from April 6, 2017 through date of judgment, and 6.5% per annum
20 on \$93,599.58 from October 30, 2017 through date of judgment.

21 **3. Post-judgment interest**

22 Post-judgment interest is governed by federal law, which provides that interest
23 “shall be allowed on any money judgment in a civil case recovered in a district court.” 28
24 U.S.C. § 1961(a); *see American Tel. & Tel. Co.*, 98 F.3d at 1209. Post-judgment interest is
25 calculated from the date of the judgment entry, at a rate equal to the weekly average 1-year
26 constant maturity Treasury yield for the calendar week proceeding. 28 U.S.C. § 1961(a). It
27 shall be computed daily to the date of payment and compounded annually. *Id.* at § 1961(b).
28 Post-judgment interest is calculated at the rate of 2.59% on the aggregate of \$296,256.84

1 plus prejudgment interest.

2 **4. Attorney costs and fees**

3 Finally, Granite State seeks recovery of reasonable attorney's fees and costs.
4 Arizona law allows the court to award the "successful party reasonable attorney fees" in
5 any "contested action arising out of a contract." A.R.S. § 12-341.01. It also mandates that
6 the "successful party to a civil action" recover all "costs expended or incurred." A.R.S. §
7 12-341. The trial court has substantial discretion in determining who is a successful party.
8 *Assyia v. State Farm Mut. Auto. Ins. Co.*, 273 P.3d 668, 675 (Ariz. App. 2012). However,
9 once the prevailing party is determined, the awarding of costs is mandatory. *McEvoy v.*
10 *Aerotek, Inc.*, 34 P.3d 979, 981 (Ariz. App. 2001). Plaintiff's Amended Complaint includes
11 meritorious claims, and Defendant's failure to respond resulted in entry of default.
12 Therefore, Plaintiff is the successful party, entitling it to recovery of costs.

13 However, the recovery of attorney's fees requires the party's success in a "contested
14 action." A.R.S. § 12-3401.01. A contested action is one in which the defendant has
15 appeared and generally defends against the claims and demands made by the plaintiff.
16 *Morrison v. Shanwick Int'l Corp.*, 804 P.2d 768, 775 (Ariz. App. 1990); *See also BRT*
17 *Funding, LLC v. Carlsbad Dev. I, LLC*, 2009 WL 2486008, *2 (D. Ariz. Aug. 12, 2009).
18 Here, Defendant failed to appear or respond to any of Plaintiff's demands. While Granite
19 State prevailed, it did so in an uncontested action. Therefore, attorney fees are not
20 recoverable.

21 **CONCLUSION**

22 Accordingly, IT IS ORDERED:

23 Plaintiff's Motion for Default Judgment (Doc. 18) is GRANTED IN PART AND
24 DENIED IN PART. Judgment is granted in favor of Plaintiff Granite State Insurance
25 Company and against Defendant CME Professional Services, LLC, in the principal amount
26 of \$296,256.84; along with prejudgment judgment interest on \$202,657.26 at the rate of
27 6.5% per annum from April 6, 2017 to date of judgment, and prejudgment interest on
28 \$93,599.58 at the rate of 6.5% per annum from October 30, 2017 to date of judgment; along

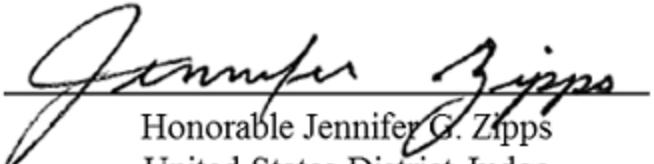
1 with post-judgment interest at the rate of 2.59% per annum from the date of judgment until
2 paid, upon Plaintiff's entire judgment award (including the principal amount and
3 prejudgment interest).

4 IT IS FURTHER ORDERED that Plaintiff's request for attorney's fees pursuant to
5 A.R.S. § 12-341.01 is DENIED.
6

7 IT IS FURTHER ORDERED that Plaintiff's request for costs pursuant to A.R.S. §
8 12-341 is GRANTED. Plaintiff shall file its bill of costs within fourteen days of the entry
9 of judgment.

10 IT IS FURTHER ORDERED that the Clerk of Court enter judgment accordingly
11 and close this case.
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13 Dated this 30th day of January, 2019.
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18 Honorable Jennifer G. Zipps
19 United States District Judge
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